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FEDERAL COMMUNICATIONS COMMISSION
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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of

1998 Biennial Regulatory Review
Spectrum Aggregation Limits
for Wireless Telecommunications Carriers

WT Docket No. 98-205

Cellular Telecommunications Industry
Association's Petition for
Forbearance From the 45 MHz
CMRS Spectrum Cap

Amendment to Parts of 20 and 24 of
the Commission's Rules - Broadband PCS
Competitive Bidding and the Commercial
Mobile Radio Service Spectrum Cap

WT Docket No. 96-59

Implementation of Sections 3(n) and
332 of the Communications Act
Regulatory Treatment of Mobile Services

GN Docket No. 93-252

Initial Comments Of Sonera Ltd.

Sonera Ltd. ("Sonera"), acting through counsel and in accordance with the FCC's Notice of Proposed Rulemaking, FCC 98-308, released December 10, 1998 ("NPRM"), herein submits its Initial Comments on the CMRS spectrum cap proposals.

I. Summary and Background

1. Sonera Ltd. is a 19.423% investor in Aerial Communications, Inc. ("Aerial"), a C-Block PCS licensee. As an investor in Aerial, and thus an interested party, Sonera requests clarification of the Commission's current standards for affiliating ownership interests, codified in Section 20.6 of the rules. In light of a prior Commission staff interpretation of existing rules, Sonera requests that

the Commission relax the CMRS ownership attribution standards to allow non-managing, minority investors to hold multiple insulated interests in CMRS licensees without breaching the spectrum cap.

2. In the summer of 1998, in the context of Sonera's initial investment in Aerial, Sonera and Aerial met with the Commission's Wireless Telecommunications Bureau ("WTB") staff to determine the scope of Section 20.6's attribution rule. The Aerial/Sonera investment agreement contemplated that Aerial and Sonera would invest in existing PCS licensees, as well as joint venture with each other to acquire additional PCS licenses. Based upon certain hypothetical scenarios presented by counsel for Sonera and Aerial, the WTB staff informed Sonera and Aerial that they would be attributed with the spectrum of all other parties with whom they joint ventured, even those parties that held minority, non-managing, insulated interests.

3. The impact of this "reading" of Section 20.6 is best illustrated through a hypothetical. Sonera, Aerial, and the C-Block PCS licensee for the Charlotte BTA each hold a 25% non-controlling, non-managing interest in LLC#1, the C-Block PCS licensee for Dallas.¹ A qualified designated entity holds the remaining 25% ownership interest in LLC#1. Separately, Sonera and Aerial desired to form LLC #2, which would have no other owners or managers, to acquire a separate 30 MHz license in the Charlotte BTA. The WTB staff ultimately advised that LLC #2 would be precluded from holding the second 30 MHz license in the Charlotte BTA because each of them is attributed with the ownership interest of the C-Block PCS licensee in Charlotte, as a result of their ownership interest in LLC#1.

¹ Since the hypothetical licensee is a small business or designated entity, the ownership threshold is 40%. See 47 C.F.R. §20.6(d)(2).

4. The Commission's current spectrum cap rule prohibits licensees in the broadband PCS, cellular or SMR service from holding an attributable interest in more than 45 MHz of licensed spectrum with significant overlap in any geographic area. 47 C.F.R. § 20.6(a). The rule determining whether spectrum is "attributable" covers a variety of ownership and management situations, but generally requires parties with significant ownership or management relationships to count that spectrum when totaling the amount of spectrum in a particular geographic area. In the above example, however, Sonera, Aerial, and the C-Block PCS licensee for Charlotte each has a minority, non-management, insulated interest in the Dallas licensee. As insulated owners, they do not manage the system, and the Commission's control group rules prohibits them from playing a major management role. Likewise, Sonera and Aerial have no interest in the Charlotte BTA licensee, and cannot exert control over that market. Therefore, Sonera believes the WTB staff interpretation of Section 20.6 is overly broad and inconsistent with the language and intent of the rule. Sonera therefore requests clarification that the attribution standards do not require attribution of spectrum held by otherwise unaffiliated entities solely because those entities hold minority, insulated interests in the same licensee in another geographic area.

II. The Plain Language Of Section 20.6 Does Not Require Attribution Of The Spectrum Of Insulated Minority Owners.

5. Neither the language nor the intent of Section 20.6 preclude an insulated investor from investment in other geographic areas solely because another insulated investor happens to be attributed with spectrum in that area. In the example above, the plain language of Section 20.6 does not preclude LLC #2 from acquiring a 30 MHz license in the Charlotte BTA. First, Section 20.6 does not direct non-managing, minority investors to aggregate their minority, passive interests for purposes of the spectrum cap. Therefore, Aerial and Sonera's interests in the Dallas BTA should not be considered to be 50% simply because they have a joint venture in another market. Second, even if Sonera and Aerial's interests were combined because they are affiliates, Sonera/Aerial should

only be deemed to control the Dallas BTA licensee, and be attributed with that licensee's spectrum ownership only. Section 20.6 does not contemplate that investors in one license will be attributed with all the spectrum of all other insulated owners in all other markets.

6. The rule must be clarified for a number of reasons. The rule as written does not adequately explain precisely what conduct the WTB staff determined to be prohibited. It is fundamentally unfair to licensees to have a rule so unclear that they cannot comply with it.² Second, the Commission's staff, as well as the public, must understand the rule so that it can be impartially applied. As discussed in further detail below, clarity on this point will allow all investors to take full advantage of the flexibility the rule offers, thus maximizing the number of potential investors in wireless infrastructure. This will encourage additional investment, including foreign capital, which is clearly in the public interest. Sonera therefore requests that the Commission state that the ownership interests discussed in the example above do not preclude Sonera and Aerial from forming a separate legal entity to compete in different geographic markets against its insulated Dallas BTA investor.

III. The WTB Staff's Interpretation Of Section 20.6 Is Inconsistent With The Commission's Policy Goals In The Spectrum Cap And Foreign Entry Proceedings.

7. The Commission should clarify the ownership attribution rule because the WTB staff's position is inconsistent with the Commission's announced goals for the spectrum cap and foreign entry proceedings: promoting investment in wireless services, minimizing regulation, and protecting the public from undue market concentration. The purpose of the spectrum cap was to "provide an expedited means of ensuring that multiple service providers would be able to obtain spectrum in each market and thus facilitate development of competitive markets for wireless services."³ The

² See, e.g. McElroy Electronics Corp. v. F.C.C., 990 F.2d 1351, 1366 (D.C. Cir. 1993) ("it is well settled that regulations cannot be construed to mean what an agency intended but did not adequately express" (internal citations omitted)).

³ NPRM at 3, Para. 2.

Commission also sought to promote wireless competition with wireline companies, as well as promote, not impede, introduction of services.⁴ The Commission also relaxed foreign ownership limitations because it recognized that “facilitating foreign investment in U.S. wireless markets will significantly enhance competition . . .”⁵

8. The WTB staff’s overly broad interpretation of the attribution provisions of Section 20.6 effectively eliminates qualified, well-financed potential competitors in markets by virtue of their insulated, minority interests in different geographic areas. Such a result is both ironic and inconsistent with the Commission’s stated goals. The Commission’s rules should instead maximize the number of potential competitors and investors in wireless markets. In the spectrum cap proceeding, the Commission stated that it seeks to ensure that the attribution rules related to the spectrum cap do not impede access to capital.⁶ An overly broad interpretation of the rule has a chilling effect on investment interest in the U.S., and is particularly unfair to foreign carriers anticipating open access to U.S. markets.⁷

9. The Commission said that it would “endeavor to craft narrowly any regulation to impose only the minimum restraint on the market necessary to achieve the public interest.”⁸ The WTB staff interpretation of the attribution rule substantially broadens the scope of prohibited investment in wireless carriers and therefore fails to meet the Commission’s goal. This interpretation creates uncertainty among potential investors, who did not have sufficient, clear notice of the scope of the rule at the outset of the proceeding. Unless the rule is clarified, cautious investors may properly require WTB staff guidance on each investment decision, thus necessitating more involvement by

⁴ NPRM at p. 5, Para. 5.

⁵ *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, Order and Notice of Proposed Rulemaking*, 12 F.C.C. Rcd 7847, 7876 (1997).

⁶ NPRM at 28, Para. 60.

⁷ See, e.g., *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, Report and Order and Order on Reconsideration*, 12 F.C.C. Rcd. 23891, 23903 (1997).

⁸ NPRM at 4, Para. 5.

Commission staff, and causing delay in investment decisions. Thus, the staff interpretation does not further the Commission's goals of narrowly crafted regulation. In fact, it likely imposes more extreme restraint than necessary on passive investors, which do not pose the same threat of exercising undue market power than managing or controlling entities.

10. The Commission also said that the spectrum cap's purpose was to "promote diversity and competition in mobile services, *by recognizing the possibility that mobile service licensees might exert undue market power or inhibit market entry* by other service providers if permitted to aggregate large amounts of spectrum."⁹(emphasis added). Minority, insulated investment poses no threat of a licensee exercising undue market power, because those interests, by definition, do not include management or controlling ownership interests.¹⁰

IV Conclusion

11. In the NPRM, the Commission proposed to examine the broad policy issues related to the CMRS spectrum cap. Sonera's request for relief relates to a narrow, but important, issue related to attribution. The relief requested herein is that the Commission clarify the existing attribution rule in order to eliminate its unnecessarily broad reach and thereby (i) clearly set the scope of attribution; (ii) reduce the complexity of attribution for minority and insulated owners and (iii) encourage additional capital investment in the U.S. wireless industry. As noted above, the goals of the CMRS

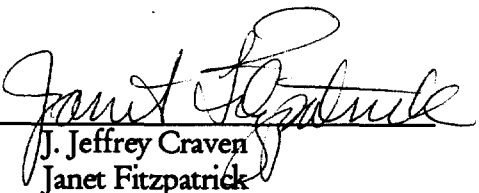
⁹ *Application for Review of BellSouth Wireless, Inc.; Amendment of Parts 20 and 24 of the Commission's Rules-Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, Memorandum Opinion and Order, 12 F.C.C.Rcd. 14031, 14038-39 (1997).

¹⁰ Sonera specifically does not seek to relax Section 20.6 to the extent that it could acquire 30 MHz of spectrum in markets operated by Aerial's sister company, U.S. Cellular. Sonera recognizes that such overlap would result in entities with common control owning geographically overlapping licenses.

spectrum cap and foreign ownership proceedings are being impeded by the current policy. The Commission should clarify or relax, as necessary the ownership attribution standards to allow insulated minority owners to freely participate in the wireless market.

Respectfully submitted,

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